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IN THE

Supreme Court of the United States

October Term, 1989

MARTIN A. SCHOTTENFELD,

Petitioner,

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and THOMAS J. GALVIN,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Respondents' Brief in Opposition

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(7918)

Question Presented

The question presented in this case is whether the terms of respondent's pension plan, which credits service and salary up to age 65 only, were properly interpreted and applied to petitioner.

Listing of Parent Companies, Subsidiaries and Affiliates

Pursuant to Rule 28.1 of the Supreme Court Rules, the following is a list of all parent companies, subsidiaries (except wholly-owned subsidiaries) and affiliates of Consolidated Edison Company of New York, Inc.:

Honeoye Storage Corporation (a subsidiary corporation).

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MARTIN A. SCHOTTENFELD,

Petitioner,

against

CONSOLIDATED EDISON COMPANY OF NEW YORK, INC. and THOMAS J. GALVIN,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

Respondents' Brief in Opposition

The respondents, Consolidated Edison Company of New York, Inc., and Thomas J. Galvin, respectfully request that this Court deny the petition for writ of certiorari seeking review of the order and decision of the Second Circuit Court of Appeals in this case, which affirmed the judgment of the District Court substantially for the reasons set forth in the District Court's opinion. The order and decision of the Second Circuit and the opinion of the District Court are

reproduced in petitioner's Appendix at P3 to P6, and P7 to P18, respectively.*

Counter-Statement of the Case

This is an action instituted by Martin A. Schottenfeld against Consolidated Edison Company of New York, Inc. ("Con Edison"), and Thomas J. Galvin, Plan Administrator. Mr. Schottenfeld is a retired former management employee of Con Edison currently receiving a pension under Con Edison's Retirement Plan for Management Employees. The petitioner seeks an upward adjustment to his monthly pension benefit.

The Proceedings Below

Petitioner brought this action under Section 502(a)(1)(B) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. 1132(a)(1)(B). He contended below that his pension benefits were improperly calculated by respondents in that respondents failed to include in their calculation petitioner's 23 months of service and salary between his 65th birthday and his retirement on July 1, 1986, just prior to his 67th birthday.

On December 22, 1987, petitioner moved in the District Court for partial summary judgment. Respondents cross-moved for summary judgment dismissing the complaint. In a memorandum opinion filed on August 22, 1988, the District Court granted summary judgment in favor of respondents. The court concluded a) that petitioner had misread the terms of the pension plan, b) that at no time during petitioner's employment did the plan provide that

*Parenthetical references denoted "(P_____)" are to the petitioner's Appendix to the petition for certiorari.

months or years worked after age 65 would be credited for pension purposes, and c) that petitioner was aware prior to his sixty-fifth birthday of respondents' view that his pension would remain unchanged should he continue to work beyond age 65 (P7-P18).

On August 26, 1988, the District Court entered judgment dismissing the complaint (P21-P22). On September 23, 1988, petitioner appealed to the Second Circuit (P23-P24), and on March 3, 1989, the Second Circuit affirmed substantially for the reasons set forth in the District Court's opinion (P3-P6).

Counter-Statement of the Facts

A. Company Pension Plan

Throughout the period of his employment, petitioner was covered by Con Edison-sponsored pension plans which credited earnings and years of service prior to age 65 for purposes of determining pension benefits but never provided credit for employment after age 65. To be more specific, under the pension plan in effect from 1969 (when petitioner joined Con Edison) to 1975, an employee could elect to retire at any one of three times: (a) upon attaining the normal retirement age of 62; (b) upon attaining the mandatory retirement age of 65; or (c) upon attaining the early optional retirement age of 45 or over provided the employee's age plus years of accredited service totalled not less than 75. The pension plan did not provide pension benefits for any period of service beyond age 65 because that was the mandatory retirement age.

Following enactment of ERISA, 29 U.S.C. 1001 *et seq.*, Con Edison adopted a new pension plan ("1975 Pension Plan"), effective August 1, 1975. The 1975 Pension Plan,

an ERISA defined benefit pension plan, retained the previous plan's requirement for mandatory retirement at age 65 (Exhibit A to Respondents' Appendix hereto, RA5).*

Between August 1, 1975 and January 1, 1983, the 1975 Pension Plan was amended several times. One such set of amendments deleted provisions referring to age 65 as the "mandatory" retirement age. The restated plan incorporating such amendment is reproduced as Exhibit C to Respondents' Appendix hereto (RA8-RA49). This amendment was made necessary because of the enactment in 1978 of amendments to the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*, which prohibited employers from requiring that covered employees retire before attaining age 70. This amendment to the 1975 Pension Plan, however, added a new term, "Normal Retirement Date," which was defined as the first day of the month following a participant's attainment of age 65 (RA16). Thus, the 1975 Pension Plan retained the long-standing limitation that pension credits for service and earnings** would not continue to accrue beyond a participant's sixty-fifth birthday. This provision remained in the 1975 Pension Plan throughout the remaining period of petitioner's employment.

On January 1, 1983, a new plan, the Consolidated Edison Retirement Plan for Management Employees ("Management Pension Plan"), was adopted. This plan is reproduced as Exhibit D to Respondents' Appendix hereto (RA50-RA100). It covered all employees who were on the

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*Parenthetical references denoted "(RA____)" are to the Respondents' Appendix to this brief in opposition.

**The definition of the "Total Salary" used for computing a pension benefit was also amended to mean compensation prior to normal retirement date (RA14).

agement payroll as of December 31, 1982 and all management employees hired thereafter. Like its predecessor plans, the Management Pension Plan did not provide for the accrual of pension credit, *i.e.*, Accredited Service, for an employee's service or earnings beyond age 65 (RA57, RA59, RA72). Management employees such as petitioner who were on Con Edison's payroll on December 31, 1982, and retire under the Management Pension Plan after that date, receive a pension benefit on retirement equal to the greater of the benefits calculated under the old formula contained in the 1975 Pension Plan or the new formula that first appeared in the Management Pension Plan when it was adopted effective January 1, 1983 (RA56, RA73-RA74). That provision was continued in the Management Pension Plan as amended and in effect through the date when plaintiff retired on July 1, 1986 (RA110, RA131). The plan as amended through 1986 is reproduced as Exhibit E to Respondents' Appendix hereto (RA103-RA179).

Two concepts are central to the benefit calculation under both the old and new formulas: Accredited Service, and Normal Retirement Date. Only Accredited Service counts for pension credit purposes, and Accredited Service is defined as service prior to Normal Retirement Date (RA57, RA72; RA111, RA127). Normal Retirement Date is defined as the first day of the month following the Participant's attainment of age 65 (RA59; RA113). Thus, these provisions of the plan provide pension credit only for petitioner's service prior to his Normal Retirement Date, *i.e.*, August 1, 1984.

When petitioner retired on July 1, 1986, he received a retirement pension benefit calculated under the formula contained in the 1975 Pension Plan because it provided a greater dollar benefit to him than the new formula. Because

"Accredited Service" under the pension plan applicable to petitioner did not include service after Normal Retirement Date (age 65), petitioner's pension benefit did not include credit for his twenty-three months of service after his August 1, 1984 Normal Retirement Date.

B. Summary Plan Description Booklet

In January 1983, Con Edison prepared and distributed to its management employees a Summary Plan Description booklet describing the highlights of the Management Pension Plan. (RA180). The summary booklet contains the following language:

> Your *normal retirement* date under the plan is the first day of the month following your 65th birthday. . . . If you choose to continue working for the Company past your normal retirement date, your pension will be deferred until you actually retire. In such case, your pension will be equal to the amount you would have received had you retired at normal retirement date.

(RA185-RA186). Furthermore, the booklet states under the heading "Plan Documents" that:

> This booklet describes only the highlights of the plan and does not attempt to cover all its details. These are provided in the official plan text and Trust Agreement which legally govern the operation of the plan. In the event of any conflict between the official documents and the booklet, the former will prevail. (RA208-RA209).

C. Notice Provided To Petitioner

In 1984, petitioner received notification prior to his sixty-fifth birthday that he would not accrue additional pension benefits for any service after age 65. Petitioner signed a memorandum at his April 24, 1984 pre-retirement interview on the subject of "Pension Credit for Service After Attaining Age 65." The memorandum is reproduced as Exhibit E to Respondents' Appendix hereto (RA101-RA102). This memorandum clearly states: "As permitted by the law, you will not accrue pension service credit after your normal retirement date, which at Con Edison is the first day of the month following your attainment of age 65" (RA101).

Petitioner also received a copy of the summary plan description booklet for the Management Pension Plan that was distributed to all management employees in January 1983.

Reasons why the petition should be denied

I. The court below correctly interpreted and applied the pension plan

A. The plan text does not provide pension credit for employment beyond age 65

Each pension plan that petitioner participated in provided credit only for employment up to age 65:

— The pre-ERISA plan in effect when petitioner was hired in 1969 provided for mandatory retirement at age 65 (P9);

— the 1975 Pension Plan retained the same age 65 mandatory retirement rule (P9-P10, RA4-RA5);

— when the 1975 Pension Plan was amended to allow employment beyond age 65, the amendment also

provided that no pension credit would be granted for service beyond age 65 (P11, RA14, RA16, RA25); and

— when a new plan was adopted for management employees in 1983, it retained the former plan's provision that no pension credit would be granted for service beyond age 65 (RA57, RA59, RA72; RA111, RA113, RA127).

Petitioner acknowledged receiving notice of this feature of the pension plan in 1984 prior to reaching age 65 (P13).

The District Court found that the provisions of the pension plan giving credit for service and salary only up to age 65 were applicable to petitioner and defeated his claim for additional pension credit for service beyond age 65.

Petitioner argues here, as he did in the courts below, that the summary plan description booklet supports his claim for additional credit beyond age 65 (P14-P15). But the booklet itself states in unmistakable terms on page 2 that the normal retirement date is age 65, and that an employee who continues to work past age 65 will receive a pension upon retirement equal to the amount he would have received had he retired at age 65 (RA185-RA186). Thus, as the District Court decision noted (P15), "the booklet also clearly put plaintiff on notice that service after his 65th birthday would not be credited in calculating his pension. Moreover, as noted above, no prior pension plan provided pension credit for service after age 65."

Furthermore, the summary booklet states explicitly:

> This booklet describes only the highlights of the plan and does not attempt to cover all its details. These are provided in the official plan text and Trust

> Agreement which legally govern the operation of the plan. In the event of any conflict between the official documents and the booklet, the former will prevail. (RA208-RA209).

Thus, as stated by the District Court (P16), "even if the summary booklet conflicted with the official plan text, which it does not, the official plan text would control." *See, Kolentus v. Avco Corp.*, 798 F.2d 949, 958 (7th Cir. 1986), *cert. denied*, 479 U.S. 1032 (1987):

> [W]hen the summary booklet expressly states that it is merely an outline of the pension plan and that the formal text of the plan governs in the event a question arises, the petitioners cannot rely on the general statements of the booklet but must look to the plan itself.

B. 1975 and later pension plan amendments are applicable to petitioner and did not reduce petitioner's accrued pension benefits

Petitioner argues that amendments made to the 1975 Pension Plan were made without the consent of the plan participants and therefore may not be applied to him. Petitioner also asserts that the amendments reduced his benefits.

Under Section 402(b)(3) of ERISA, 29 U.S.C. 1102(b)(3), every pension plan must make provision for amendments to the plan. The 1975 Pension Plan contains such a provision:

> The Company . . . reserves the right in its absolute discretion at any time and from time to time, to amend, modify or terminate in whole or in part the

> Plan and the contributions thereunder. . . . No such amendment or modification shall retroactively affect adversely employees' benefits under the Plan. (RA47).

Thus, pursuant to ERISA and the relevant plan provision, the plan may be freely amended at any time without the consent of plan participants if no accrued benefits are forfeited.

Amendments made to the 1975 Pension Plan to add the defined term "Normal Retirement Date" to mean the first day of the month following a participant's sixty-fifth birthday did not cause forfeiture of any employee's accrued benefits because, prior to the amendment, the plan already provided for mandatory retirement at age 65. Similarly, the amendments did not reduce petitioner's benefits under the prior plan because the plan never provided benefits for service beyond the then-mandatory retirement age of 65.* Therefore, such amendment is consistent with the authorization contained in ERISA and in the plan itself, did not reduce benefits, and is fully applicable to petitioner.

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*Petitioner's last service as a Con Edison employee was in 1986. After his retirement, ERISA Section 204(b)(1) was amended by Section 9202 of the Omnibus Budget Reconciliation Act of 1986 ("OBRA"), P.L. 99-509, 100 Stat. 1975-1978 (1986), to require continued benefit accrual for service beyond normal retirement age but, pursuant to OBRA Section 9204(a), P.L. 99-509, 100 Stat. 1979, "only with respect to plan years beginning on or after January 1, 1988, and only to employees who have 1 hour of service in any plan year to which such amendments apply." Thus, these changes in the law, while not applicable to petitioner, provide prospective assurance that situations similar to petitioner's will not likely reoccur in other cases.

II. There is no conflict between the circuits

Petitioner contends the decision below conflicts with the First Circuit decision in *Mahoney et al. [Hoefel] v. Atlas Tack Corp.*, 581 F.2d 1 (1st Cir. 1978), *cert. denied,* 440 U.S. 913 (1979). However, that decision is clearly distinguishable. Unlike this case, *Atlas Tack* is a pre-ERISA case decided under the common law of Massachusetts. It concerned a pre-1974 termination of a pension plan that resulted in the discontinuance of pension payments to the plaintiffs who had already retired with vested rights. *Atlas Tack, supra,* at 4. In the present case, a) petitioner's pension is provided pursuant to a qualified ERISA defined benefit pension plan, b) the plan has not been terminated, c) petitioner continues to receive a pension under the plan, and d) no amendment has caused any diminution or termination of petitioner's vested pension benefits.* Therefore, *Atlas Tack* is not relevant and does not create a conflict requiring a decision by this Court. In essence, that case stands for the principle that "pension plans be construed, where possible, to avoid the forfeiture of rights which an employee, through years of service, has earned. . . ." *Atlas Tack, supra,* at 6. However, this case presents no question of forfeiture; rather, the terms of the applicable plan simply do not, and never did, provide the post-age 65 benefits which petitioner seeks.

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*In addition, the *Atlas Tack* decision notes, at 6-7, that the effect of the pension plan change there was never explained to the plaintiffs. Here, in contrast, petitioner acknowledged receiving an explanation of the effect of the plan provision at issue before he reached age 65 (RA101).

Conclusion

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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